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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

## No. 437

LOUIS L. ATKINS,
*Petitioner,*

vs.

GREENVILLE SHIPBUILDING CORPORATION,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

### INTRODUCTION

This case involves an attempt by Petitioner to extend the doctrine of *Reed* v. *YAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963), far beyond anything contemplated by this Court when that case was decided. Recognizing that this case was a far cry from being within the

scope of *Reed* v. *YAKA*, both the United States District Court for the Northern District of Mississippi and the United States Court of Appeals for the Fifth Circuit rejected Petitioner's contentions. Here the Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court. Rather, the Court of Appeals' decision rests upon a doctrine enunciated by this Court in 1887 and undisturbed by this or any other court in eighty-two years. There being no special or important reasons for the granting of this Petition for Certiorari, Respondent respectfully submits that the Petition should be denied.

## OPINIONS BELOW

The United States District Court for the Northern District of Mississippi rendered an opinion on June 14, 1968 granting summary judgment for Respondent. This opinion is reprinted as Appendix A to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court was handed down on May 12, 1969 and is reprinted as Appendix B to the Petition for a Writ of Certiorari. Neither of these opinions has yet been reported in the Federal Reporter, Second Series, or the Federal Supplement.

## JURISDICTION

Original federal jurisdiction of this cause was predicated upon the general maritime law of the United States. United States Constitution, Article III, Section 2, Clause 1. This Court has discretion as to whether or not it will review this case under the authority granted in Section 1254(1), Title 28, United States Code.

## STATUTES INVOLVED

**Section 903, Title 33, United States Code:**

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

**Section 905, Title 33, United States Code:**

The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was

caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

## QUESTIONS PRESENTED

Petitioner has not formally presented any specific questions for consideration by the Court. Respondent would assume that the following questions are implicitly presented by the Petition filed in this case:

(1) Whether or not, under the facts in this case, Respondent's floating dry dock was a "vessel."

(2) Whether or not, under the facts in this case, at the time of his alleged accident Petitioner was engaged in duties traditionally performed by seamen.

(3) Whether or not, when either question (1) or (2) is answered adversely to Petitioner, under the facts of this case, the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act constitute a bar to a civil action based on unseaworthiness.

(4) Whether or not, when there is no genuine issue as to any material fact, the above questions can be decided on a motion for summary judgment.

## STATEMENT OF THE CASE

Petitioner, Louis L. Atkins, filed this suit alleging the unseaworthiness of a floating dry dock owned by Respondent and a causal connection between such alleged unseaworthiness and personal injuries which he sustained on or about July 26, 1966. Prior to the date of his injury, Petitioner had been employed as a welder on board said floating dry dock, which was securely moored to the banks of Lake Ferguson, a navigable body of water in Greenville, Mississippi.

Respondent answered the suit alleging, among other things, that Petitioner was a longshoreman within the meaning of the Longshoremen's and Harbor Workers' Compensation Act and that Respondent was an employer within the meaning of that Act. Respondent further alleged that the injury or accident occurred on a dry dock which would clearly bring the case within the express language of the Longshoremen's Act. 33 *U.S.C.A.*, §903. Recognizing that *Reed* v. *YAKA, supra,* had created an exception to the ordinary exclusiveness of liability provisions of the Longshoremen's Act, Respondent further alleged that at the time of his accident and injury, Petitioner was not on board any "vessel" nor was he engaged in duties traditionally performed by seamen.

After development of the facts through various discovery procedures, Respondent moved for summary judgment. The District Court granted summary judgment and, on appeal, the United States Court of Appeals for the Fifth Circuit affirmed.

## REASONS FOR DENYING CERTIORARI

### (a) The Decision of the Court of Appeals Does Not Conflict with the Decision of the U. S. Court of Appeals for the Second Circuit in Bernardo v. Bethlehem Steel Company.

Petitioner argues, as his primary reason why this Court should grant certiorari, that the Court of Appeals' decision in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Bernardo* v. *Bethlehem Steel Company,* 314 F.2d 604 (2 Cir., 1963). With all due respect, Respondent submits that there is absolutely no conflict between the decision of the Court of Appeals for the Fifth Circuit here and the decision of the Court of Appeals for the Second

Circuit in *Bernardo*. Respondent submits that the Court of Appeals in the instant case was correct in noting the absence of such a conflict as Petitioner here urges (See Appendix B to Petition for Certiorari, p. 31).

At the outset, it is important to note that the instant case is predicated upon the general maritime law and is a suit based upon the alleged unseaworthiness of a would-be "vessel". *Bernardo*, on the other hand, was a suit based upon the Jones Act, 46 *U.S.C.A.*, §688, and upon a number of other theories of recovery.

The *Bernardo* case has a long history. See *Bernardo* v. *Bethlehem Steel Company*, 169 F. Supp. 914 (S.D.N.Y., 1959), on Defendant's motion for summary judgment; and *Bernardo* v. *Bethlehem Steel Company*, 200 F. Supp. 534 (S.D.N.Y., 1961), on Plaintiff's motion for judgment notwithstanding the verdict. With respect to the opinion of the Court of Appeals in *Bernardo*, which Petitioner here points to as being in conflict with the decision of the Court of Appeals in the instant case, we would point out that the situation in *Bernardo* was procedurally the opposite of our case. In *Bernardo*, the District Court jury had found that the dry dock was not a "vessel" and had returned a verdict accordingly. On appeal Plaintiff was attacking the jury verdict on the ground that the dry dock should have been held to be a vessel as a matter of law. In this posture, the Court of Appeals naturally concerned itself with whether or not there was sufficient evidence in the record to support the jury finding that the dry dock was not a vessel. The holding of the Court of Appeals in *Bernardo* was that there was an evidentiary basis in the record to support the verdict of the jury. The language in the *Bernardo* opinion of the Court of Appeals which Petitioner says is in conflict with the holding below in the instant case is pure dicta.

The Court of Appeals in *Bernardo* stated that, because of the procedural posture of the case, the position of the Defendant before trial and verdict, that as a matter of law the dry dock was not a vessel, was not properly before the Court for decision. Therefore, the Court stated that it was not passing on this argument advanced by Defendant but instead was merely holding that the verdict of the jury should not be disturbed. 314 F.2d at 608. Thus, the Court of Appeals in the instant case was quite correct in noting that "In *Bernardo* the Court was not called upon to make the determination we here make." Appendix B to Petition for Writ of Certiorari, p. 31.

The District Court in *Bernardo* emphasized that the denial of summary judgment there was based upon the inherent discretion of the Court in passing upon such motions. 169 F. Supp. at 917. There, a number of theories of recovery were advanced by Plaintiff, some based upon state law, and some based upon federal law. In denying summary judgment the District Court stated that

> "Summary judgment may be denied in the exercise of sound discretion where a portion of an action ripe for summary judgment 'is intertwined with another claim that must be tried . . .'." 169 F. Supp. at 917.

Here, Petitioner sued only on the theory of unseaworthiness. In *Bernardo,* the plaintiff sued under the Jones Act, under the general maritime law for unseaworthiness, and under the common law for negligence. The Court noted that the "omnibus complaint advances about as many theories of liability as could be thought of". 169 F. Supp. at 916. In the instant case the complications which prompted the District Court in *Bernardo* to exercise its discretion and deny summary judgment are not present.

It is also important to point out that when *Bernardo* was before the Court on motion for summary judgment, it

appeared from the record before the Court on that motion that the Plaintiff alternated in working on the various dry docks owned by Defendant and on board various vessels owned and/or controlled by Defendant. 169 F. Supp. at 916. This evidence clearly presented an issue of fact on the question of whether or not Plaintiff was a member of the crew of a vessel, thus precluding summary judgment. In the case now before this Court, however, neither the District Court nor the Court of Appeals found any such issue of fact. Here it is uncontradicted that the Petitioner never worked on a vessel. All of his time was spent on the dry dock and on shore in the shipyard.

Further, the District Court in *Bernardo* recognized the vitality of such decisions of the United States Court of Appeals for the Fifth Circuit as *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5 Cir., 1960), and expressly held that the rule, that Jones Act cases must be submitted to a jury,

> "Is not absolute, and in certain cases it is still possible for the Court to direct the verdict where the evidence clearly resolved the issues in favor of either side." 200 F. Supp. at 537.

Of course, summary judgment is also available where there is no genuine issue as to any material fact in a maritime personal injury action.

All of this history of the *Bernardo* case makes it clear that there is nothing in *Bernardo* which is in conflict with the holding of the United States Court of Appeals for the Fifth Circuit below. For that reason, there is no conflict between the Circuits which would support a grant of this petition for a writ of certiorari.

**(b) The Question of Whether or Not a Floating Dry Dock Was a "Vessel" Was Resolved by This Court As Early As 1887 and Has Not Been Disturbed Since.**

Petitioner objects strenuously to the holding by the United States Court of Appeals for the Fifth Circuit that as a matter of law a floating dry dock is not a "vessel". Respondent respectfully submits that the holding of the Court of Appeals here is completely sound, and furthermore, that there is no reason for this Court to review that holding because of the fact that this Court is already firmly on record in support of that holding. *Cope* v. *Vallette Dry Dock Company,* 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887).

Respondent has thoroughly researched the case law on the question of whether or not a dry dock is a "vessel". We have found numerous cases and authorities dealing with this question and these cases have arisen in a wide variety of contexts, and have construed the provisions of several statutes. In none of these cases, however, has any Court suggested that a dry dock should be considered a vessel. They all hold that a dry dock is not a vessel.

The following authorities support the proposition that a dry dock is not a "vessel". *Cope* v. *Vallette Dry Dock Company, supra*; *Perry* v. *Haines,* 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903); *Snyder* v. *A Floating Dry Dock,* 22 Fed. 685 (D.N.J., 1884); *The Warfield,* 120 Fed. 847 (E.D.N.Y., 1903); *The San Cristobal,* 215 Fed. 615 (S.D.Ala., 1914), affirmed, 230 Fed. 599 (5 Cir., 1916); *Berton* v. *Tietjen & Lang Dry Dock Co.,* 219 Fed. 763 (D.N.J., 1915); *DeMartino* v. *Bethlehem Steel Company,* 164 F.2d 177, 179 (1 Cir., 1947); *United States* v. *Bethlehem Steel Company,* 235 F. Supp. 569 (D.Md., 1964); *1 Benedict on Admiralty* (6th ed., 1940), §54, p. 115, fn. 21; Norris, *Mari-*

*time Personal Injuries* (2d ed., 1966), §12, p. 23; 1 Norris, *The Law of Seamen* (2d ed., 1962), §9, p. 14; Gilmore and Black, *The Law of Admiralty* (1957), §1-11, pp. 29-30; *Robinson on Admiralty* (1939), §8, p. 45; 2 C.J.S., *Admiralty*, §18b; 2 Am. Jur. 2d, *Admiralty*, §34.

All of the above authorities, when coupled with the decision of the Court of Appeals below, make it abundantly clear that a floating dry dock simply is not within the legal definition of a "vessel". This matter being so well settled, Respondent respectfully submits that further consideration of the question by this Court is unnecessary.

**(c) Nothing contained in the opinion of the Court of Appeals Conflicts with the Doctrine of Reed v. Yaka.**

In *Reed* v. *YAKA*, *supra*, this Court held that a shore-based worker engaged in seaman's work could sue his employer under the doctrine of unseaworthiness for injuries proximately caused by any unseaworthy condition in an employer-owned vessel. Petitioner argues in his petition that the Court of Appeals' decision below was contrary to the holding of *Reed* v. *YAKA*, and that therefore this Court should grant certiorari and reverse, presumably as it did in *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1967).

A review of the facts in this case makes it immediately apparent that Petitioner's reliance upon *Reed* v. *YAKA* is misplaced. A study of the history of the *Reed* v. *YAKA* doctrine is necessary to a proper understanding of the contours of that doctrine. See *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); and *Ryan Stevedoring Co.*, v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). An examination of these cases makes it clear that before a longshoreman may come within the doctrine of *Reed* v. *YAKA*, he must establish (1)

that he was working on board an employer-owned "vessel", the unseaworthiness of which proximately caused or contributed to his injuries, and (2) that at the time of his injuries he was engaged in work traditionally that of a seaman. Factually, Petitioner passes neither test in this case.

The dry dock with which we are here concerned was built and constructed by Greenville Shipbuilding Corporation at its shipyard during the years 1961 and 1962. This dry dock is situated on Lake Ferguson adjacent to the banks of Lake Ferguson. Its position is maintained on the waterfront by cables running from said floating dry dock to the bank of Lake Ferguson. This floating dry dock is now situated in the exact position in which it was placed when construction of it was completed, and said dry dock has never been moved from such position since that time. Further, this dry dock was neither designed for, nor has it been used for, navigation or commerce upon the waterways of the United States. The dry dock is without power to propel itself and could be moved from one place to another only by being towed by some vessel or through power supplied from an outside source.

The dry dock is a steel framed structure of the type commonly used in making repairs upon vessels, towboats, barges, etc. The dock itself, which is a large flat surface resembling a floor, can be lowered and raised within the steel frame. When water is pumped into the watertight compartments of the dock, the dock is lowered below the surface level of the water. This is done so that the particular vessel to be repaired may be moved into place. Once such vessel is situated within the frame directly above the submerged dock, the water is pumped out of the compartments and buoyancy of the dock raises the vessel. Once the dock has been raised in this manner and the vessel to be repaired has been lifted out of the water, the vessel becomes accessible to the repairmen for their work.

This structure sounds very little like anything even remotely resembling a "vessel". The United States Court of Appeals for the Fifth Circuit below held, as a matter of law, that this floating dry dock was not a vessel. Compare *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77, 79 (1953) (concurring opinion). There being no "vessel" in the picture, there was nothing to be unseaworthy. There being no object the unseaworthiness of which would give rise to a cause of action, Petitioner does not fall within *Reed* v. *YAKA*.

Turning now to the type of work being done by Plaintiff, the District Court accurately characterized that work as follows:

> "The Plaintiff [Petitioner] was engaged in repairs of such a character as to require the complete removal of the Barge K.C.B. 300 from the water; these repairs could not have been performed at sea; special equipment unrelated to the barge's seagoing operations was required to accomplish these repairs; the assistance of the regular crew was not called upon; the barge upon which the repairs were being performed (and the dry dock, too, for that matter) was, during the course of said repairs, not subject to any of the perils of navigation; neither the barge nor the dry dock had at the time of Plaintiff's injury crew members aboard to assist in navigation and the repairs themselves involved replacement of or repair to major portions of the barge. Looking to the character of the work being performed by Plaintiff, it seems clear, and the Court so holds, that he was at the time of his injury not engaged in work traditionally that of a seaman. Therefore, it follows that he is not one to whom the doctrine of unseaworthiness is available. Plaintiff having an adequate remedy under the Longshoreman's Act, and not being one who can avoid its exclusiveness of liability provision, the present action based on unseaworthiness must fail." Appendix A to Petition for Writ of Certiorari, pp. 21-22.

Under these facts, it is respectfully submitted that the District Court properly held that Petitioner was not engaged in work traditionally that of a seaman. The Court of Appeals did not pass upon that issue, which amounts to nothing more than a question of how one characterizes the undisputed facts of this case. It is respectfully submitted, therefore, that review of those facts by this Court is unwarranted.

**(d) The Doctrine of Reed v. YAKA Is Inapplicable to Drydock Workers and Petitioner's Theory Would Create an Arbitrary Distinction in the Law of the Sort This Court Sought to Eliminate in Reed v. YAKA.**

In addition to what has already been said above, there is still another reason why the decision below is not in conflict with this Court's decision in *Reed* v. *YAKA, supra.* In fact, it is submitted that even though this Court might conclude that the floating dry dock upon which Petitioner was injured was a "vessel" and even though this Court might conclude that Petitioner, at the time of his injury, was engaged in duties traditionally those of a seaman, this case is still not brought within the scope of the policy of *Reed* v. *YAKA* and is still barred by the Longshoremen's and Harbor Workers' Compensation Act. On this basis, and even though this Court might disagree with the Court of Appeals' holding that the dry dock was not a vessel, and even though this Court might disagree with the District Court's holding that Petitioner was not engaged in duties traditionally those of a seaman, it is respectfully submitted that the decision in this case is not in conflict with any decision of the Supreme Court. Accordingly, Petitioner's assertion that this Court must grant certiorari in order to conform the decision in the instant case to *Reed* v. *YAKA* is in error.

The following analysis of *Reed* v. *YAKA* will support the above conclusions. Reed was a longshoreman who was injured on board the S.S. YAKA, which was under the control of his employer as owner pro hac vice. Reed filed his libel in rem against the vessel to recover injuries he sustained as a result of the unseaworthiness of the YAKA. Pan-Atlantic, Reed's employer, was brought in as one of the defendants. In *Reed* it was admitted that the vessel was unseaworthy and that this unseaworthiness caused the injuries sustained by Reed. The only question before the Court was whether or not the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act prevented Reed from recovering against his employer. 310 U.S. at 413, 10 L.Ed.2d at 451.

In reaching the result that Reed could maintain the action which he had brought, this Court traced the history of the longshoreman's right to the shipowner's warranty of seaworthiness. First, in *Sieracki*, where the longshoreman was employed by an independent contractor and was not suing his employer, the Court held that the longshoreman was protected by the warranty of seaworthiness and that he could recover for any breach of that warranty. The Court emphasized the fact that like work entitled men to like protection under the doctrine of seaworthiness. Longshoremen became entitled to the warranty of seaworthiness because they did the work of seamen.

Ten years later, in the *Ryan Stevedoring* case, the Court was faced with the second stage of the *Sieracki* situation. The injured longshoreman had recovered against the shipowner, as *Sieracki* had cleared the way for him to do. The shipowner, however, then sued the stevedoring company, the employer of the injured long-

shoreman, by way of indemnity, asserting the provision of the contract between the shipowner and the stevedoring company and asserting a breach of that contract as the cause of the accident in question. The stevedoring company defended on the theory that it could not be held responsible to its own employee under the doctrine of unseaworthiness because of the bar of the Longshoremen's and Harbor Workers' Compensation Act. This Court rejected that argument and held that the shipowner could recover in contract and not in tort against the stevedoring company under that set of circumstances.

All of this leads us to the situation with which the Court was faced in *Reed* v. *YAKA*. There, in the words of this Court,

> "If the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under Ryan shifted the burden of the recovery to petitioner's stevedoring employer." 373 U.S. at 414, 10 L.Ed.2d at 452.

The Court then went on to say

> "We think it would produce a harsh and incongruous result . . ., to distinguish between liability to longshoremen injured under precisely the same circumstances because they draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company." 373 U.S. at 415, 10 L.Ed.2d at 453.

In short, in *Reed* v. *YAKA*, the Court was faced with the situation where one group of longshoremen whose primary duties involved the loading and unloading of ships of non-employers were protected by the warranty

of seaworthiness, while a second group of longshoremen doing exactly the same type of work, were outside of that protection. This, the Court reasoned, was an arbitrary and unjust situation. An injured longshoreman's legal remedies, the Court stated, should not be determined by the signature on his paycheck. "All were subjected to the same danger. All were entitled to like treatment under law." 373 U.S. at 415, 10 L.Ed.2d at 453, citing *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 413, 74 S.Ct. 202, 98 L.Ed. 143, 152 (1953).

In *Reed* v. *YAKA,* the Court found an overriding and compelling circumstance which it felt required the ignoring of the literal working of the exclusiveness of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act. That compelling situation was the distinction theretofore existing in the law between the remedies of longshoremen who were employed by the owner of the vessel on which they were injured and the remedies of longshoremen not employed by the owners of the offending vessel. When Reed brought his action against his employer, the Court was aware of the fact that thousands of longshoremen around the country already had, in the event of an injury, a right of action based on unseaworthiness. The question was whether or not Reed had a similar legal remedy. The Court correctly held that he did. That holding was reaffirmed, but in no way extended, by this Court in *Jackson* v. *Lykes Bros. Steamship Co., supra.*

In this case, this Court is concerned with dry dock workers working on dry docks of various types. As noted earlier in this brief, there are three basic types of dry docks, the marine railway, the graven dry dock which is within the land, and the floating dry dock. The men who worked upon these three different types of dry docks all

do substantially the same type of work. There is no arbitrary and unreasoned distinction drawn between different groups of dry dock workers. Under the present state of the law, all dry dock workers are already being treated equally, the precise result for which this Court strove and achieved, in *Reed* v. *YAKA*. See *Avondale Marine Ways, Inc.* v. *Henderson, supra*. All dry dock workers injured while engaged in work upon dry docks have a remedy under the Longshoremen's and Harbor Workers' Compensation Act. As the law now stands no dry dock workers of any variety have a right to sue their employers under the general maritime law for the unseaworthiness of the dry dock upon which they are working. Equally, and without distinction, workers on marine railways, on graven dry docks and on floating dry docks are treated alike under the law.

When viewed in terms of the underlying policy considerations of *Reed* v. *YAKA*, it is submitted that the case at bar is entirely different. Here, we are not faced with a situation where the injured worker has been denied certain legal rights that others doing identical work are entitled to. Here, we are not faced with a situation where some people doing the type work done by Petitioner are employed by the owner of the dry dock and others are employed by an independent contractor. It is common knowledge that all workers on dry docks are employed by the owner of the dry dock. When seen in this light, there is simply no "harsh or incongruous result" which has been produced by the decision below. In fact, were certiorari to be granted in this case and were this case to ultimately be reversed, it is submitted that the Court would thereby be creating precisely the same type of arbitrary and unreasoned distinction which it eliminated in *Reed* v. *YAKA*. All dry dock workers are already

being treated alike by the law. Accordingly, there is no inconsistency between the decision below and this Court's decision in *Reed* v. *YAKA* which would justify granting certiorari in this case.

**(e) This Court Should Not Consider Alleged Inconsistencies in the Holdings of the United States Court of Appeals for the Fifth Circuit.**

Petitioner asserts as an additional ground for the granting of certiorari that the decision below is in conflict with two other decisions of the United States Court of Appeals for the Fifth Circuit. *Offshore Co.* v. *Robison*, 266 F.2d 769 (5 Cir., 1959) and *Producers Drilling Co.* v. *Gray*, 361 F.2d 432 (5 Cir., 1967). The first of those decisions holds that a drilling rig out in the Gulf of Mexico may be held to be a "vessel" by a jury. The second of these cases holds that as a matter of law such drilling rigs are "vessels".

One distinction between *Offshore Co.* and *Producers Drilling* and the instant case is that both of the two decisions relied upon by Petitioner came in Jones Act cases. Again, we would note that the instant case does not involve a claim under the Jones Act, but rather it involves a claim under the general maritime law based upon unseaworthiness.

A more important distinction, however, may be found by comparing the drilling rigs involved in *Offshore Co.* and *Producers Drilling* with the dry dock involved in the instant case. These drilling rigs are out in the Gulf of Mexico and persons working upon them are obviously subjected to the hazards and perils of the sea. Furthermore, these drilling rigs are frequently moved from place to place on the high seas as one drilling project is completed and a new one is begun. On the other hand, the dry dock involved in the instant case is in no way subject to the

hazards and perils of navigation. This dry dock is affixed to the land, and it has never been moved from the point where it was originally placed in the water on the banks of Lake Ferguson after it was constructed. Whereas, the drilling rigs may not be vessels in the traditional sense, their use and location on the high seas does justify the conclusions reached by the courts in *Producers Drilling* and other cases. On the other hand, a dry dock such as that involved here is much, much further removed from the traditional concept of a vessel than even the floating drilling rigs out in the Gulf of Mexico. Indeed, it is far more appropriate to compare the dry dock here with the marine railway and the land dry dock than it is to compare the instant dry dock with drilling rigs. See *Avondale Marine Ways, Inc.* v. *Henderson, supra*, 346 U.S. at 367, 98 L.Ed. at 79 (concurring opinion). There is no question but that these other two types of dry docks are not vessels. Functionally, a floating dry dock is in no way different from these other two types of dry docks, and therefore it would create an arbitrary and absurd distinction in the law to call floating dry docks "vessels" while other dry docks are not "vessels". Accordingly, we submit that the instant case is not in conflict with the other decisions of the United States Court of Appeals for the Fifth Circuit cited above.

It is apparent from a reading of the opinion of the Court of Appeals below that the panel which decided the case saw no conflict in this decision and the cases mentioned above. It is noteworthy that Judge Thornberry, who wrote the opinion for the Court in *Producers Drilling Co.* v. *Gray*, was a member of the panel in the instant case below. Surely, if Judge Thornberry had seen a conflict in the decision below and his own opinion in *Producers Drilling*, he would have found some appropriate method of expressing his views. Respondent submits, of course, that Judge Thornberry found no conflict in the instant case and

*Producers Drilling* for the reason that no conflict exists. Therefore, this Court certainly should not become embroiled in such an imaginary controversy within the Fifth Circuit.

## CONCLUSION

For the reasons stated above, Respondent respectfully and with deference suggests that there are no special or important reasons present in this case to support the granting of the Petition for a Writ of Certiorari. The opinion of the Court of Appeals is sound and lucid. There is no reason for further review.

Respectfully submitted,

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## CERTIFICATE

I, J. ROBERTSHAW, member of the Bar of this Court, hereby certify that I have this day mailed, postage prepaid, two true copies of the above Brief in Opposition to Certiorari to Honorable Fountain D. Dawson, Attorney at Law, P. O. Box 1151, Greenville, Mississippi 38701, to Honorable Robert G. Hebert, Attorney at Law, 608 American Bank Building, New Orleans, Louisiana 70130, and to Honorable Samuel C. Gainsburgh, Kierr & Gainsburgh, Attorneys at Law, 1718 National Bank of Commerce Building, New Orleans, Louisiana 70112.

This 7th day of August, 1969.

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J. ROBERTSHAW